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Helen Ginger Berrigan

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Executive Clemency, First-offender pardons; Automatic Restoration of Rights*

*Judge Helen Ginger Berrigan***

The 1974 Louisiana Constitution embodied the legislature's hope that criminal offenders had potential to change and to live productive lives. The Constitution provided that full rights of citizenship would be restored automatically once a felon completed his sentence. All first-time felony offenders received automatic pardons upon completion of their sentences. A Pardon Board was created for the first time, allowing for the full-time processing of requests for commutations of sentence and pardons for repeat offenders.

In Louisiana and across the nation, the public has grown more concerned over crime and has lost faith in the concept of rehabilitation. These trends have led to increasing emphasis on punishment and shrinking of opportunities for offenders to rehabilitate themselves.¹

I. THE 1973 CONSTITUTIONAL CONVENTION

Under the 1921 Constitution, the governor had authority to grant pardons and commutations of sentence upon the recommendations of the Lieutenant Governor, the Attorney General, and the judge who presided over the conviction.² A 1968 amendment added an automatic pardon for first offenders.

The 1973 Constitutional Convention entirely revamped the pardon process. The proposal from the Committee on the Executive Department gave the governor the complete and sole discretion to grant pardons and commutations of sentence.³ As soon as the proposal was introduced on the Convention floor, an amendment was offered which would have swung the pendulum in the opposite direction. It would have provided that the proposed gubernatorial

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* Executive clemency in Louisiana encompasses reprieves, commutations of sentence, pardons and remittance of fines and forfeitures. This article deals exclusively with commutations of sentence and pardons.

** U.S. District Court Judge, Eastern District of Louisiana.

1. See, e. g., Jack Wardlaw & Ed Anderson, *La. Leads Nation in Prisoners*, The Times Picayune, Mar. 16, 1999, at A1; Fox Butterfield, *Tougher Laws on Sentencing Increase Prison Population*, The Times Picayune, Jan. 11, 1999, at A3; Symposium, *Will Building More U.S. Prisons Take a Bite Out of Crime?*, Insight On the News, June 7, 1999, at 24; Editorial: *The Facts About Crime*, Boston Herald, Jan. 16, 1999, at 14.

2. La. Const. of 1921, art. V, § 10.

3. V Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts at 577 (Aug. 3, 1973).

power to grant clemency "may [have been] restricted or limited" by the legislature. Supporters of the amendment complained of past gubernatorial abuses of the clemency process.⁵ According to the debate, the proposed amendment would allow the legislature to prevent the governor from granting clemency in certain categories of cases; of particular concern were life sentences. Nevertheless, the amendment was defeated, albeit by a narrow 45-52 margin.⁶ The next amendment proposed the creation of a Pardon Board consisting of five persons appointed by the governor but confirmed by the Senate. The governor could grant pardons and commutations of sentence *only* upon the recommendation of this newly created Pardon Board. The amendment also included the automatic pardon for first offenders, a provision carried over from the prior constitution. The amendment passed 102-1.⁷ Another proposed amendment would have allowed the legislature to restrict the governor's power to commute or pardon offenses punishable by life imprisonment. That amendment was defeated by a relatively narrow 46-63 margin.⁸

The provision ultimately adopted by the Convention as Article IV, Section 5(E) of the Constitution read as follows:

(1) The governor may grant reprieves to persons convicted of offenses against the state and, upon recommendation of the Board of Pardons, may commute sentences, pardon those convicted of offenses against the state, and remit fines and forfeitures imposed for such offenses. However, a first offender never previously convicted of a felony shall be pardoned automatically upon completion of his sentence, without a recommendation of the Board of Pardons and without action by the governor.

(2) The Board of Pardons shall consist of five electors appointed by the governor, subject to confirmation by the Senate. Each member of the board shall serve a term concurrent with that of the governor appointing him.

In addition to the pardon provisions, the Constitutional Convention enacted a "second chance" opportunity for criminal offenders. The Declaration of Rights, Article 1, Section 20 declares: "Full rights of citizenship shall be restored upon termination of state

4. I Records of the Louisiana Constitutional Convention of 1973: Journal of Proceedings at 261 (Aug. 3, 1973).

5. V Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts at 582-83 (Aug. 3, 1973).

6. I Records of the Louisiana Constitutional Convention of 1973: Journal of Proceedings at 262 (Aug. 3, 1973).

7. *Id.* at 265.

8. *Id.* at 266.

and federal supervision following conviction for any offense.” During the debate regarding this article, opponents voiced concerns that the “rights” would be too broadly interpreted. Proponents maintained that the provision was intended to restore only rights such as the right to vote and to hold public office.⁹

II. JUDICIAL INTERPRETATIONS OF THE 1974 CONSTITUTIONAL PROVISIONS

A. *Gubernatorial Pardon*

Even prior to the 1973 Convention, Louisiana courts consistently held that a gubernatorial pardon restored the person to a “status of innocence of crime.”¹⁰ This status means, among other things, that the conviction cannot be used later to enhance punishment if the person is convicted of a new crime. The Louisiana Supreme Court has held, however, that the conviction may still be used to impeach a witness in court, although the pardon is also admissible for the jury’s evaluation.¹¹ The Louisiana Code of Evidence, enacted in 1989, precludes use of a conviction for impeachment purposes if it was nullified, by a pardon or otherwise, “explicitly based on a finding of innocence.”¹²

B. *First-Offender Pardon*

The 1974 Constitution does not distinguish between the effects of a first-offender pardon and a gubernatorial pardon, and there were no debates at the convention regarding the potential differences. However, the two are treated differently by the Louisiana Supreme Court. In *State v. Adams*,¹³ the supreme court concluded that the automatic pardon does *not* restore a person to the status of innocence, as does a full pardon. The court reasoned that a “full pardon granted by the governor has presumably been given the careful consideration of several persons who have taken into account the circumstances surrounding the offense, and particular facts relating to the

9. VII Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts at 1201-03 (Sept. 8, 1973).

10. *State v. Childers*, 197 La. 715, 2 So. 2d 189 (1941); *State v. Lee*, 171 La. 744, 132 So. 219 (1931).

11. *State v. Clark*, 402 So. 2d 684 (La. 1981); *State v. Boudreaux*, 221 La. 1078, 61 So. 2d 878 (1952).

12. La. Code Evid. arts. 609, 609.1.

13. 355 So. 2d 917 (La. 1978).

individual."¹⁴ The first-offender pardon, on the other hand, is granted without Pardon Board review or explicit consideration by the governor. As a result, the high court held that the automatic first-offender pardon does *not* prevent the conviction from being used later to adjudicate the person a multiple offender. Similarly, an automatically pardoned first offender is still subject to laws prohibiting former felons from possessing firearms.¹⁵ A first-offender pardon likewise does not preclude the conviction from being used as a disqualification for occupational licensing.¹⁶ Nor does it prevent restrictions on a person's driving license privileges.¹⁷ Finally, a person is entitled to only one first-offender pardon.¹⁸ The Constitution's equal treatment of the first-offender and gubernatorial pardons notwithstanding, the courts have restricted the benefits of the first-offender pardon because it is not based on the innocence of the offender.

C. Restoration of Rights

Article 1, Section 20 of the 1974 Constitution provided in part, "[f]ull rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense." In interpreting the intent of this provision, the Louisiana Supreme Court looked to the Convention debate and concluded that again, unlike a full pardon, the restoration of rights did not return a person to the status of innocence. Rather, "the ultimate language, 'rights of citizenship,' was adopted to make it clear that the drafters' intent was to restore the customary rights a citizen may exercise (the rights to vote, work, hold public office, etc.) and not to erase automatically the fact of the conviction."¹⁹ Accordingly, the high court has found that one citizenship right *not* restored by Section 20 is the right to "keep or bear arms."²⁰ Consequently, the legislature may prohibit the possession of firearms by ex-felons.²¹ At least one appellate court has

14. *Id.* at 922.

15. *State v. Riser*, 704 So. 2d 946 (La. App. 2d Cir. 1997); *State v. Wiggins*, 432 So. 2d 234 (La. 1983).

16. *Catanese v. Louisiana Gaming Control Bd.*, 712 So. 2d 666 (La. App. 1st Cir. 1998) (gaming license); *Eicher v. Louisiana State Police, Riverboat Gaming Enforcement Div.*, 710 So. 2d 799 (La. App. 1st Cir. 1998); *Davis v. Louisiana State Bd. of Nursing*, 691 So. 2d 170 (La. App. 1st Cir. 1997) (nursing license).

17. *Dear v. State of Louisiana*, 682 So. 2d 862 (La. App. 2d Cir. 1996).

18. La. R.S. 15:572(D) (1992).

19. *State v. Adams*, 355 So. 2d 917, 921-22 (La. 1978); *see also State v. Selmon*, 343 So. 2d 720, 722 (La. 1977).

20. La. Const. art. I, §11; *State v. Williams*, 358 So. 2d 943 (La. 1978); *State v. Amos*, 343 So. 2d 166 (La. 1977).

21. *Williams*, 358 So. 2d at 946; *Amos*, 343 So. 2d at 168; *State v. West*, 754

concluded that Section 20 does *not* restore what might be considered another 'right of citizenship'—the right to serve as a juror.²² As with a first-offender pardon, the restoration of rights after a conviction does not preclude that same conviction from being used at a later date to enhance punishment for a new offense.²³ Likewise, courts have referenced the debate to conclude that the restoration is limited to "rights" and does not endow "privileges;" hence, the conviction can be used to preclude the person from obtaining an occupational license or a liquor license.²⁴

III. LEGISLATIVE CHANGES

As executive clemency is a constitutional power granted to the executive branch, the legislature is without authority to pass laws precluding or directly restricting pardons or commutations of sentence.²⁵ Without a constitutional amendment, the legislature cannot make substantive changes to the governor's clemency authority. Nevertheless, the legislature does have the authority to establish the procedural rules, which it has used to limit the number of offenders who are eligible for clemency.

The legislature has made several unsuccessful attempts to curtail the governor's clemency power through constitutional amendments. In 1987, for example, a constitutional amendment and legislation were proposed that would have allowed the legislature to set qualifications for Pardon Board members.²⁶ This effort was fueled in part by the indictment on bribery charges of the then Pardon Board Chairman.²⁷ In 1988, two other constitutional amendments were introduced—one to abolish the governor's authority to pardon or commute sentences, another to dismantle the Pardon Board structure and replace it in each particular case with the presiding judge, the local district attorney and the state attorney general.²⁸ Passage of these amendments would have taken the appointment process entirely out of the hands of the governor.

So. 2d 408 (La. App. 2d Cir. 2000).

22. *State v. Haynes*, 514 So. 2d 1206 (La. App. 2d Cir. 1987).

23. *Adams*, 355 So. 2d at 921-22; *Selmon*, 343 So. 2d at 722.

24. *Williams v. Louisiana Bd. (Comm'n) of Alcoholic Beverages*, 317 So. 2d 247 (La. App. 3d Cir. 1975).

25. *State v. Lee*, 171 La. 744, 132 So. 219 (1931); *State v. Cortina*, 632 So. 2d 335 (La. App. 1st Cir. 1993).

26. *Action Deferred on Bill Allowing Qualifications for Pardon Board*, Baton Rouge Advocate, Apr. 30, 1987, at 11A; John LaPlante, *House Rejects Bill to Limit Pardon Board Membership*, Baton Rouge Advocate, June 16, 1987, at 6A.

27. Howard Hoffman, *Marsellus State Pardons Case is Latest in Controversy Over Appointed Board*, Baton Rouge State Times, Sept. 11, 1987, at 1B.

28. *Louisiana Constitution Faces Reform*, Baton Rouge Advocate, Apr. 9, 1998, at 1B.

Finally, in 1999, the automatic first-offender pardon provision was successfully amended. Instead of *all* first offenders receiving automatic pardons upon completion of their sentences, the legislature passed and the voters enacted an amendment that restricts this eligibility to persons convicted either of nonviolent offenses or other specified, less serious violent offenses.²⁹ First offenders convicted of crimes such as rape, robbery or homicide now have to apply to the Pardon Board if they wish to obtain a pardon.³⁰

While a constitutional amendment is needed to change the substance of the gubernatorial clemency power, only legislative enactments are needed to change the procedure. Since 1974, the legislature has enacted a number of requirements that make it more difficult for a person to obtain a favorable recommendation for clemency. Some of the requirements involve the makeup of the Pardon Board itself, the steps needed to apply for clemency, and the number of votes required for a favorable recommendation. Other requirements restrict the eligibility of those serving life sentences. Still others involve opening up the process to more public scrutiny, an unquestionably laudable goal,³¹ but also one that will probably lessen the likelihood of a favorable result for the person seeking clemency.

Louisiana Revised Statute 15:572 provides the procedural framework for the clemency process. Louisiana Revised Statute 15:574.1 originally gave the governor discretion to appoint the members of the Pardon Board, subject only to confirmation by the Senate. In 1995, the legislature added the requirement that "at least" one member be appointed from a list submitted by the membership of the Victims and Citizens Against Crime, Inc.,³² a New Orleans based anti-crime and victims' rights organization. Louisiana Revised Statute 15:574.1 also originally provided that a majority of the total

29. In addition to nonviolent offenses, the specific offenses for which a first offender is still eligible for the automatic pardon are aggravated battery, second degree battery, aggravated assault, mingling harmful substances, aggravated criminal damage to property, purse snatching, extortion, or illegal use of weapons or dangerous instrumentalities.

30. As a measure of the legislative and public distrust of the gubernatorial clemency power, another amendment to the Constitution was also passed in 1999 which expressly stated that the governor could approve clemency only upon a "favorable" recommendation from the Pardon Board. 1999 La. Acts No. 1401. The fear was that under the prior language, a governor could conceivably grant clemency even though the Pardon Board "recommendation" was negative. See Jack Wardlaw, *Son of Constitutional Amendments*, The Times Picayune, Oct. 27, 1999, at B7.

31. See *Unveiling Pardons and Parole*, The Times Picayune, Mar. 23, 1997, at B6.

32. 1995 La. Acts No. 1150.

membership was needed to vote a favorable recommendation; because the Board consisted of five members, this meant three out of five. In 1997, the statute was amended to require four out of the five for a favorable vote,³³ obviously making it more difficult for an applicant to receive a favorable recommendation.

Louisiana Revised Statute 15:572.4 sets out the procedures for applying for clemency. As originally enacted, it was relatively simple:

Every application for a pardon received by the board shall be registered chronologically, considered by it at least once and, if a recommendation for pardon is denied, reasons for the denial shall be affixed to the application. Thereafter the application, together with any additional supporting evidence thereafter presented, shall be reviewed at least once again. Each application for pardon which is approved by the board shall be forwarded to the governor.

Before considering the application for pardon of any person, the board shall give written notice to the district attorney of the parish in which the applicant was convicted, to the applicant, and any other interested persons of the date and time at which the application will be heard and considered. The district attorney and any other persons who desire to do so shall be given a reasonable opportunity to attend the meeting and be heard.

Because of numerous amendments over the years, the previously simple statute now has a number of further procedural requirements that erect barriers in front of offenders who wish to seek clemency. Now, the offender must give notice not only to the district attorney where the offense occurred, but also to the sheriff, the injured victim, the spouse or next of kin of the injured or deceased victim, and any other interested person.³⁴ All are assured the opportunity to testify at the hearing. Because these parties are either law enforcement officials or connected somehow to the victim, they are presumably more likely to object to, rather than support, an offender's application for clemency. The offender is also required to publish three times in the local newspaper where the crime occurred his intent to apply for clemency. While this notice provides an opportunity for supporters as well as detractors to be informed, common sense dictates that members of the public will be wary of any criminal offender seeking a commutation or

33. 1997 La. Acts No. 828.

34. See also La. R.S. 15:574 (1992 and Supp. 2001).

pardon, unless they personally know the offender and believe otherwise.

A person serving a life sentence is now ineligible to apply for clemency for fifteen years after being sentenced. If denied clemency, that applicant may not reapply for another six years. If denied again, he must wait three more years to reapply. Louisiana Revised Statutes 15:573 originally simply stated that the sessions of the Pardon Board would be public. In 1999, an amendment was added to prohibit the Board from taking any action on an application at any time other than during a meeting open to the public.³⁵ In 1997, the legislature added a statute to prohibit anyone from *recommending* clemency to the Board except in an open hearing or in a written letter which would be deemed a public record available for public inspection.³⁶ A knowing violation of this rule is a crime. The requirement of public disclosure does not apply to letters *opposing* clemency, unless they are written by public officials.³⁷ Again, because public officials are subject to the will of the electorate, a public official supporting a clemency application may hesitate to express that view because his view will be open to public scrutiny; opposing a clemency application is less likely to be viewed by public officials as unpopular. Louisiana Revised Statutes 15:574.12(A) provides generally that the information gathered by the Pardon Board in connection with a clemency application is confidential. This includes the pre-sentence investigation reports and the applicant's prison record. This statute was amended in 1989 to provide a broad exception to the general rule: "following an application for pardon . . . all information pertaining to an individual's misconduct while incarcerated . . . information pertaining to disposition of criminal charges and incarcerations . . . shall be released to the general public at any time upon request."³⁸ Because the Pardon Board already has this information, the statute is obviously not intended to provide any new material to them. The purpose is apparently to make available to the public negative information about the applicant prior to the hearing, presumably so that opposition can be fueled.

IV. EXECUTIVE CLEMENCY TODAY

With the exception of first-offender pardons, the substance of the clemency power as granted to the governor by the 1974 Constitution remains unchanged today. If a favorable recommendation is made,

35. 1999 La. Acts No. 246.

36. 1997 La. Acts No. 821; La. R.S. 15:573.1 (Supp. 2001).

37. *See also* La. R.S. 15:574.12(G)(1)(b) (Supp. 2001).

38. 1989 La. Acts No. 680.

the governor still has the unfettered discretion to grant or deny it. Procedurally and practically, however, it is now more difficult for an applicant to obtain a favorable recommendation from the Pardon Board, without which the governor cannot act. The procedural difficulties include the requirement that four members, rather than three, must vote favorably on a recommendation for it to be effective and also the ineligibility of persons serving life sentences to apply for significant periods of time. The practical obstacles include the mandated greater public scrutiny of the process, such as the requirement that favorable letters of recommendation be made public, arguably chilling the enthusiasm, particularly of public officials, to urge a favorable recommendation.

